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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-851

LYNN SEEBER, GENERAL MANAGER OF THE TENESSEE VALLEY AUTHORITY, ET AL., PETITIONERS

V.

STATE OF ALABAMA AND ALABAMA AIR POLLUTION CONTROL COMMISSION, EX REL. WILLIAM J. BAXLEY, ATTORNEY GENERAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' [redacted] MOTION TO CONSOLIDATE WITH 74-220

WILLIAM J. BAXLEY
Attorney General of Alabama

HENRY H. CADDELL
Assistant Attorney General of Alabama
Chief, Environmental Protection Division

MYRON H. THOMPSON
Special Assistant Attorney General

FREDERICK S. MIDDLETON, III
Assistant Attorney General

ATTORNEY FOR RESPONDENTS

250 Administrative Building
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RESPONDENTS' MOTION TO RECONSIDER AND GRANT PETITION FOR WRIT OF CERTIORARI AND MOTION TO CONSOLIDATE

Respondents State of Alabama and the Alabama Air Pollution Control Commission move this Honorable Court to reconsider and grant the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit; and they further move this Honorable Court to consolidate this case with *Kentucky v. Train*, No. 74-220.

WILLIAM J. BAXLEY
Attorney General of Alabama

HENRY H. CADDELL
Assistant Attorney General of Alabama
Chief, Environmental Protection Division

MYRON H. THOMPSON
Special Assistant Attorney General
FREDERICK S. MIDDLETON, III
Assistant Attorney General
ATTORNEY FOR RESPONDENTS
250 Administrative Building
Montgomery, Alabama 36104

MEMORANDUM IN SUPPORT OF MOTIONS

On September 3, 1974, in the case *Kentucky v. Train*, No. 74-220, the Commonwealth of Kentucky petitioned this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the circuit's holding and opinion that Section 118 of the 1970 Clean Air Act Amendments[1] *does not* require federal facilities located in Kentucky to comply with Kentucky's air pollution control permit regulation, Kentucky Administrative Regulation, AP-1, Section 5 (1).

On January 6, 1975, petitioners (federal officials) in this case, *Seeber v. Alabama*, petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that circuit's purportedly conflicting holding and opinion that Section 118 *does* require federal facilities located in Alabama to comply with Alabama's air pollution control permit requirements as set forth in Rule 1.12 of the Alabama Air Pollution Control Rules and Regulations. Respondents State of Alabama and the Alabama Air Pollution Control Commission in a memorandum filed with this Court offered "no objections to a review in this Court of the opinion of the Fifth Circuit, along

[1] 42 U.S.C. 1857f; Clean Air Act Amendments of 1970, Sec. 118, 84 Stat. 1689.

with that of the Sixth Circuit and those of any other Circuits which may come before this Court."

On March 17, 1975, this Court granted the petition in the Kentucky case, but as of this date has not ruled on the petition in the Alabama case. Thus, at this time, the Supreme Court has before it for direct review the permit requirement and trial facts from only one state, Kentucky. Because this Court has decided to review the Kentucky case, respondents State of Alabama and the Commission now respectfully urge this Honorable Court to grant the petition for certiorari filed in the Alabama case and to consolidate the Alabama case with the Kentucky case, on two grounds:

FIRST: The State of Alabama simply and earnestly wishes to be heard. Alabama is the only state that has successfully litigated the issue whether Section 118 requires federal facilities to comply with state air pollution control permit requirements; and Alabama commenced the present litigation on October 20, 1972, almost three years ago, and before Kentucky brought its own action. Therefore, Alabama has developed so far an extensive, winning background of law and facts which it wishes to present to this Court.

SECOND: The Kentucky air pollution control permit regulation, as presented in all its briefs and as considered by the federal courts below, is substantially different in scope from the Alabama air pollution control permit requirements. As a result, the reason for the difference in outcome between the Fifth and Sixth Circuits may be that the two circuits considered substantially different state requirements.

A

Kentucky Administrative Regulation AP-1, Section 5(1) is a simple, one sentence regulation, which provides:

> "No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect."

Apparently, Kentucky considers subsection (1) of Regulation AP-1, Section 5 as fully embodying the Kentucky air pollution control permit regulation. Kentucky states on page 16 of its *Petition for Writ of Certiorari* filed in the Kentucky case that " 'The Kentucky Plan' contains, among other requirements related to the administration and implementation of the Act, a permit requirement. This permit requirement, embodied in Section 5 of the Kentucky Administrative Regulation AP-1 . . . is the basic control provision of the entire 'Kentucky Plan'." Kentucky in the petition then refers the reader to "Appendix C" to the petition where only a part, subsection (1), of Regulation AP-1, Section 5 is actually reproduced. Similarly, on pages 20 and 21 of the *Brief for Petitioner* filed in the Kentucky case, Kentucky refers to and reproduces only subsection (1) for this Court's consideration. Furthermore, apparently as a result of Kentucky's reliance on only subsection (1) in the lower federal courts, both the Sixth Circuit and the United States District Court for the Western District of Kentucky relied exclusively on subsection (1) of Regulation AP-1, Section 5

as the extent of the Kentucky permit requirement.[2] See the opinions of these two Courts on pages 2a and 24a of the *Petition for Writ of Certiorari* filed in the Kentucky case.

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[2] Regulation AP-1. Section 5, in its entirety and as it appears in 1972 when Kentucky filed its lawsuit, is as follows

"(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

"(2) (a) Applications for permits required under Section 5 (1) hereof shall be made on forms prepared by the Commission for such purpose and shall contain such information as the Commission shall deem necessary to determine whether the permit should be issued.

"(b) Applications for permits shall be signed by the corporate President, his authorized agent; or by an equivalently responsible officer in the case of organizations other than corporations; or, in other cases, by the source owner or operator; or, in the case of political subdivisions, by the highest elected official of such subdivision. Such signature shall constitute personal affirmation that the statements made in the application are true and complete.

"(c) The information requested in the application shall, when specifically requested by the Commission, include an analysis of the characteristics, properties, and volume of the air contaminants taken under normal operatingg conditions. Failure to supply information required or deemed necessary by the Commission to enable it to act upon the permit application shall result in denial of the permit.

"(d) An application for a permit may include one or more air contaminant sources provided that all of such air contaminant sources are contained within one facility. A permittee may apply for an amended permit to include new air contaminant sources provided that such new air contaminant sources are contained within the same facility.

"(3) (a) In considering permit applications, the Commission shall determine if emission standards or ambient standards are met. In no case shall a permit to construct or operate be issued where it can be shown through diffusion calculations or actual ambient air quality monitoring, that the air contaminant source will prevent or interfere with the attainment of maintenance of state or federal air quality standards. In cases where no emission standards have been prescribed by regulation the Commission shall require the

Irrespective of the reason or reasons Kentucky may have for limiting the focus of its litigation to subsection (1) of Regulation AP-1, Section 5, the subsection is far from embodying or exemplifying all the measures Alabama considers and has considered as part of its air pollution control permit requirements. The Alabama permit requirements (as reproduced in the "Appendix" filed with the Fifth Circuit and as substantially reproduced in the opinion of the Fifth Circuit) are complex, comprehensive, lengthy regulations, specifically covering such matters as compliance schedules, emission limitations, operating time provisions, record keeping requirements, testing and monitoring provisions, and

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use of all available, practical and reasonable methods to prevent and control air pollution.

"(b) In the event any person or persons alleges themselves under oath to be presently affected adversely by the air contaminant source or physical conditions maintained, the Commission shall afford such persons a hearing to determine whether the permit shall be issued or denied. Such hearings shall be held in accordance with the provisions of AP-10, Sec. 4 and AP-10, Sec. 30 of these regulations.

"(4) Permits issued hereunder shall be subject to such terms and conditions set forth and embodied in the permit as the Commission shall deem necessary to insure compliance with its standards. Such terms and conditions may include maintenance and availability of records relating to operations which may cause or contribute to air pollution including periodic source or stack sampling of the air contaminant sources.

"(5) Permits issued hereunder shall be subject to revocation or modification by the Commission, pursuant to the provisions of KRS 224-390, for the following causes:

"(a) Failure to comply with the terms and conditions of the permit;
"(b) Failure to comply with emission standards applicable to the air contaminant source;

"(c) Failure to comply with the ambient air standards for the area in which the air contaminant source is located.

"(6) This regulation shall not apply to those air contaminant sources listed in AP-1, Sec. 4 (4).55

The State of Alabama does not know why Kentucky limited its reference to subsection (1) in its litigation.

emergency episode control provisions. These requirements contained in Rule 1.12 of the Alabama Air Pollution Control Rules and Regulations, are as follows:

"1.12 Permits.

"1.2.1 Permits Required.

(a) Permit to Construct. Any person building, erecting, altering or replacing any article, machine, equipment or other contrivance, the use of which may cause the issuance of or an increase in the issuance of air contaminants or the use of which may eliminate or reduce or control the issuance of air contaminants, shall first obtain authorization for such construction from the Director in the form of a Permit to Construct. A Permit to Construct shall remain in effect until the permit to operate the equipment for which the application was filed is granted or denied or the application is canceled.

"(b) Permit to Operate.

"(1) Before any article, machine, equipment or other contrivance described in paragraph (a) may be operated or used, a written permit shall be obtained from the Director. No permit to operate shall be granted for any article, machine, equipment or contrivance described in paragraph (a), constructed or installed without authorization as required by paragraph (a), until the information required as presented to the Director and such article, machine, equipment or contrivance is altered, if necessary, and made to conform to the standards established by the Commission.

"(2) Any article, machine, equipment or other con-

trivance described in paragraph (a) which is presently operating (or which is not presently operating but which is capable of being operated) without a Permit to Operate, may continue to operate (or may restart) only if its owner or operator obtains a Permit to Operate prior to a date to be set by the Director (or prior to restarting).

"(3) The Director shall have the authority to decide cases where an article, machine, equipment, or other contrivance is not clearly subject to nor exempt from the application of this Part. In addition, the Director may rule that a particular article, machine, equipment or other contrivance is subject to the application of this Part even though it is exempt from the system according to Sections 1.12.1 and 1.12.2 of this Part. The operator or builder of such an article, a machine, equipment or other contrivance may appeal the Director's classification to the Commission, which shall overrule the Director only if it is shown that he acted arbitrarily and contrary to the purposes of the Act.

"c) Display of Permit to Operate. A person who has been granted a Permit to Operate any article, machine, equipment, or other contrivance shall keep such Permit under file or on display at all times at the site where the article, machine, equipment, or other contrivance is located and will make such a permit readily available for inspection by any and all persons who may request to see it.

"1.12.2 Exemptions. From time to time the Director may specify certain classes or sizes of articles, machines, equipment, or other contrivances which would normally be subject to the requirement to obtain Permits to Operate or Construct, as being exempt from the requirement to obtain such permits. Exempt sources are subject in every other way to these rules and regulations.

"1.12.3 Transfer. A Permit to Construct or Operate shall not be transferable whether by operation of law or otherwise, either from one location to another, from one piece of equipment to another, or from one person to another.

"1.12.4 Applications. Every application for a Permit to Construct or Operate required under Section 1.12.1 shall be filed in the manner and form prescribed by the Director and shall give all the information necessary to enable the Director to make the determination required by Section 1.12.8.

"1.12.5 Cancellation of Applications. A Permit to Construct shall expire and the application shall be canceled two years from the date of issuance of the Permit to Construct if the construction has not begun.

"1.12.6 Action of Application. The Director shall act, within a reasonable time, on an application for Permit to Construct, Permit to Operate and shall notify the applicant in writing of its approval, conditional approval or denial.

"1.12.7 Provision of Sampling and Testing Facilities. A person operating or using any article, machine, equipment or other contrivance for which these rules and regulations require a permit shall provide and maintain such sampling and testing facilities as specified in the Permit to Construct or Permit to Operate.

"1.12.8 Standards for Granting Applications.

(a) The Director shall deny a permit except as provided by Section 1.12.9, if the applicant does not show that every article, machine, equipment or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it may be expected to operate without emitting or without causing to be emitted air contaminants in violation of these rules and regulations.

"(b) The Director shall deny a permit if the applicant does not present, in writing, a plan whereby the emission of air contaminants by every article, machine, equipment, or other contrivance described in the permit application, will be reduced during periods of an Air Pollution Alert, Air Pollution Warning, and Air Pollution Emergency in accordance with the provisions of Chapter 2.

"(c) Before a Permit to Construct or Permit to Operate is granted, the Director may require the applicant to provide and maintain such facilities as are necessary for sampling and testing purposes in order to secure information that will disclose the nature, extent, quantity or degree of air contaminants discharged into the atmosphere from the article, machine, equipment or other contrivance described in the Permit to Construct or Permit to Operate. In the event of such a requirement, the Director shall notify the applicant in writing of the required size, number and location of the sampling platform; the access to the sampling platform; and the utilities for operating the sampling and testing equipment.

"(d) The Director may also require the applicant to install, use and maintain such monitoring equipment or methods; sample such emissions in accordance with such methods, at such locations, intervals and procedures as may be specified; and provide such information as the Director may require.

"(e) Before acting on an application for Permit to Construct or Permit to Operate, the Director may require the applicant to furnish further information or further plans or specifications.

"(f) In acting upon a Permit to Operate, if the Director finds that the article, machine, equipment or other contrivance has been constructed not in accordance with the Permit to Construct, and if the changes noted are of a substantial nature in that the amount of air contaminants emitted by the article, machine, equipment or other contrivance may be increased, or in that the effect is unknown, then he shall deny the Permit to Operate. The Director shall not accept any further application for a Permit to Operate. The Director shall not accept any further application for a Permit to Operate until the article, machine, equipment or other contrivance has been reconstructed in accordance with the Permit to Construct, or until the applicant has proven to the satisfaction of the Director that the change will not cause an increase in the emission of air contaminants.

"g) The Director shall deny a Permit to Construct where he determines that the construction and operation of such source will interfere with attaining or maintaining any primary or secondary standard established by Section 1.6.1 or will allow significant deterioration of existing air quality.

"(h) In granting any Permit to Operate, the Director may allow, as a condition of such permit, for the intermittent discharge of air contaminants, during startup, shut down, rate change or load change, in excess of the limitations specified in these rules and regulations where he finds that because of the nature of the source there is no practicable alternative.

"1.12.9 Conditional Permit.

(a) The Director may issue a Permit to Construct or a Permit to Operate subject to conditions which will bring the operation of any article, machine, equipment or other contrivance within the standards of Section 1.12.8, in which case the conditions shall be specified in writing. Commencing work under such a Permit to Construct or a Permit to Operate shall be deemed acceptance of all the conditions specified. The Director shall issue a Permit to Construct or a Permit to Operate with revised conditions upon receipt of a new application, if the applicant demonstrates that the article, machine, equipment or other contrivance can operate within the standards of Section 1.12.8 under the revised conditions.

"(b) A Conditional Permit may allow an article, machine, equipment or other contrivance to be operated in violation of the conditions of Section 1.12.8 if one of the conditions of the permit is a definite schedule by which the article, machine, equipment, or contrivance may attain the conditions of Section 1.12.8 and be granted a Permit to Operate, and if the schedule provides for attaining the conditions of Section 1.12.8 at the earliest possible date and is approved by the Director. A Conditional Permit will be revoked if the applicant does not

submit progress reports to the Director according to the schedule established by the Conditional Permit. The Director may further revoke the Conditional Permit if the progress reports do not show satisfactory progress as specified by the terms of the Conditional Permit or if the progress reports are found to be inaccurate.

"(c) A Conditional Permit that allows any new article, machine , equipment or contrivance to operate in violation of the requirements of Section 1.12.8 may not be granted for a period of time greater than one year, including all renewals.

"(d) No Conditional Permit issued under this Section for any existing article, machine, equipment or contrivance may be granted for a period of time longer than the greater of the following periods:

(1) The period from the granting of the permit to a date three years after the date of initial adoption of an applicable rule or regulation.

(2) The period from the granting of the permit to a date three years after the date the Administrator of the U. S. Environmental Protection Agency approves, in accordance with Section 110 of the Federal Act, such applicable rule or regulation as a part of an implementation plan (or any revision thereof).

"1.12.10 Temporary Permit to Operate. Upon application for a Permit to Operate by a new facility, the Director shall, within a reasonable period time, dispatch an inspector to the facility in question. If the inspector determines that the facility has been constructed according to the specifications as set forth un-

der the Permit to Construct, or else that any changes to the facility would reduce or effect to an unsubstantial degree that quantity of air contaminants emitted by the facility, and if a reviewing officer of the Division agrees with this conclusion, then the Director shall issue a temporary Permit to Operate which will remain in force until an official inspection of the facility under actual operating conditions can be made and the results reviewed, or until the Temporary Permit to Operate is suspended or revoked by the Director. The Director may issue a Temporary Permit to Operate without an inspection if the applicant fulfills the following requirements:

"(a) The application for a Permit to Construct is filled out and countersigned by a Professional Engineer familiar with air pollution control as it relates to the equipment under application.

"(b) Upon completion of the construction, a Professional Engineer familiar with the Permit to Construct submits a letter to the Director, signed and sealed with his professional stamp, testifying that the construction under application has been completed and is in accordance with the specification as set down in the Permit to Construct. The Director, is empowered to reject the testimony of the Professional Engineer if the Director decides that the Professional Engineer's qualifications are insufficient to allow him to accurately and completely assess the equipment in question. A Professional Engineer may appeal any such judgment to the Commission.

"1.12.11 Denial of Application. In the event of denial of a Permit to Construct or Permit to Operate, the Director shall notify the applicant in writing of the reason therefor. Service of this notification may be made in person or by mail, and such service may be proved by the written acknowledgement of the persons served or affidavit of the person making the service. The Director shall not accept a further application unless the applicant has complied with the objections specified by the Director as its reasons for denial of the Permit to Construct or the Permit to Operate.

"1.12.12 Appeals. Within 10 days after notice by the Director of denial or conditional approval of a Permit to Construct or Permit to Operate, the applicant may petition the Commission, in writing, for a review. The Commission may sustain or reverse the action of the Director; such order may be made subject to specified conditions.

"1.12.13. The holder of a Permit under this Part shall comply with conditions contained in such Permit as well as all applicable provisions of these rules and regulations except where violations are specifically allowed in accordance with a Conditional Permit issued under Section 1.12.9."

Also of unquestionable interest to this Court is the thirty-four page Alabama air pollution control permit application reproduced in the "Appendix" filed below with the Fifth Circuit.

The Sixth Circuit, relying upon subsection (1) of Regulation AP-1, Section 5, reached the general and critical conclusion that "a permit has absolutely nothing to do with air quality." For reasons which follow, this conclusion is not logically applicable to the Alabama permit requirements.

Alabama's permit requirements, on their face, are the primary measures for attaining and maintaining air quality within the state. This observation is supported by considering the requirements against a background of the history of the 1970 Clean Air Act Amendments, the position of the states under the Amendments, and the response of the State of Alabama to the Amendments. The congressional history of the Amendments was summarized by Justice Rehnquist, speaking for this Court, in *Train v. National Resources Defense Council, Inc.*, (1975) — U.S. —, 95 S.Ct. 1470, — L.Ed. 2d—:

> "Congress initially responded to the problem of air pollution by offering encouragement and assistance to the states. In 1955 the Surgeon General was authorized to study the problem of air pollution, to support research, training and demonstration projects, and to provide technical assistance to state and local governments attempting to abate pollution. 69 Stat. 322-323. In 1960 Congress directed the Surgeon General to focus his attention on the health hazards resulting from motor vehicle emissions. 74 Stat. 162. The Clean Air Act of 1963, 77 Stat. 392-401, authorized federal authorities to expand their research efforts, to make grants to state air pollution control agencies, and also to intervene directly to abate interstate pollution in limited circumstances. Amendments in 1965, 79 Stat. 992-996, and in 1966, 80 Stat. 954-955, broadened federal authority to control motor vehicle emissions and to make grants to state pollution control agencies.
>
> "The focus shifted somewhat in the Air Quality Act of 1967, 81 Stat. 485. It reiterated the premise of the earlier Clean Air Act 'that the prevention and control of air pollution at its source is the primary responsibility

> of States and local governments.' Ibid. Its provisions, however, increased the federal role in the prevention of air pollution, by according federal authorities certain powers of supervision and enforcement. But the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so.
>
> "The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, enacted on December 31 of that year. These Amendments sharply increased federal authority and responsibility in the continuing effort to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle that, 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .' §107(a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U.S.C. §1857c-2(a). The difference under the Amendments was that the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time.
>
> "The Amendments directed that within 30 days of their enactment the Environmental Protection Agency should publish proposed regulations describing national quality standards for the 'ambient air,' which is the statute's term for the outdoor air used by the general public. After allowing 90 days for comments on the proposed

standards, the Agency was then obliged to promulgate such standards. §109(a)(1) of the Clean Air Act, as added, 84 Stat. 1679, 42 U.S.C. §1857c-4(a)(1). The standards were to be of two general types: 'primary' standards, which in the judgment of the Agency were 'requisite to protect the public health,' §109(b)(1), and 'secondary' standards, those that in the judgment of the Agency were 'requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.' §109(b)(2)." *Id.*, 95 S.Ct. at 1474.

Section 110 of the Amendments is the primary provision requiring that states attain specified air quality standards. Section 110 required, in the words of this Court, that:

"Within nine months after the Agency's promulgation of primary and secondary air quality standards, each of the 50 States . . . submit to the Agency a plan designed to implement and maintain such standards within its boundaries. (Cite omitted.) The Agency was in turn required to approve each State's plan within four months of the deadline for submission, if it had been adopted after public hearings and if it satisfied eight general conditions set forth in §110(a)(2). Probably the principal of these conditions, and the heart of the 1970 Amendments, is that the plan provide for the attainment of the national primary ambient air quality standards in the particular State 'as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan.' §110(a)(2)(A). In providing for such attainment, a State's plan must include 'emission limitations, schedules, and timetables for compliance with such limitations'; it must also contain such other measures as may be necessary to insure both timely attainment and subsequent maintenance of national ambient air standards. §110(a)(2)(B)." *Id.*, 95 S.Ct. at 1475.

These other measures included provisions "for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air qualities," and "necessary assurances that the state will have adequate personnel, funding, and authority to carry out such implementation plans." Section 110 (a) (2)(B), (C) and (F). In furtherance of and in compliance with Section 110, Alabama promulgated and submitted to the Administrator of the Agency an implementation and enforcement plan specifying the manner in which national ambient air quality standards would be achieved and maintained in the State of Alabama. The Alabama plan was approved by the Agency Administrator in Federal Register, Vol. 37, No. 105, pages 10847 and 10848, and thereby became operative under federal and state law.

At the heart of the Alabama plan is "Rule 1.12, Permits," which generally implements the congressional mandate in Section 110. The working mechanics of Rule 1.12 are summarized in the following affidavit by James W. Cooper, Director, Alabama Air Pollution Control Commission:

"The regulations prohibit the operation or use of equipment in Alabama, which would result in the issuance of air contaminants, if the owner or operator does not possess a permit issued by the Director. The regulations specify the conditions under which application for permits must be made and require the filing of an application form which includes specific information identifying the equipment or machine to be permitted. . . . The permit, when issued, will not be used merely as an instru-

ment for "registering" or "cataloging" sources of pollution in Alabama. On the contrary, the permit constitutes the heart of the Commission's administrative and enforcement program, for the permit will spell out not only specific emission limitations that must not be exceeded, but also such other provisions as operating time, record keeping requirements, testing and monitoring provisions, emergency episode control provisions, and most importantly, compliance schedules. At this point, I must emphasize that the compliance schedule is that part of the permit which would be used to insure that the owner or operator of any non-complying source would reach compliance status within the time period required by State and Federal law. The dates for the compliance schedule which would be a part of the permit would have been applied for specifically by the applicant in accordance with the forms earlier described. Each permit form provides for a signature block by which the applicant certifies that the applicant's plans will meet emission limitations specified by the Commission's rules and regulations. Consequently, the compliance schedule as well as the rest of the permit and application, constitutes a binding, enforceable commitment to meet Alabama's Air Pollution Control Rules and Regulations. It can be seen that the permit system administration by any agency goes to the heart of compliance with Alabama's State statute."

In summary, the relationship between the Amendments and Alabama's permit requirements is concentric: at the center of the Amendments is Section 110; at the center of Section 110 are the state implementation plans; and at the center of the Alabama implementation plan are the Alabama permit requirements, Rule 1.12.

Therefore, should the Sixth Circuit's general conclusion (that "a permit has absolutely nothing to do with air quality") and corresponding holding (that federal facilities need not comply with state permit requirements) be applied to Alabama's Rule 1.12, not only would the permit requirements contained in Rule 1.12 be inapplicable to federal facilities, but Section 110 would be inapplicable to federal facilities, for Rule 1.12 is the primary provision for implementing the congressional mandate in Section 110; furthermore, contrary to the long history of the 1970 Clean Air Act Amendments, the State of Alabama would again be powerless to attain and maintain national ambient air quality standards in those regions where federal facilities are located.

B.

Another difficulty with the Sixth Circuit's opinion is the application to Rule 1.12 of the "substantive-procedural" distinction fashioned by that court. The Court opined that federal facilities are required by Section 118 to comply with state *substantive* requirements, but not with state *procedural* requirements. The Court then characterized Kentucky's permit regulation as procedural with the general conclusion that "a permit has absolutely nothing to do with air quality." and observed that:

> "*Substantive requirements* of implementation plans (e g. emission standards and compliance schedules) do, and it is those 'requirements' which are essential to the improvement of air quality and are, we believe, the 'requirements' which are essential to the improvement of air quality and are, we believe, the 'requirements' respecting control and abatement of air pollution to which Section 110 of the Clean Air Act refers."

The difficulty with applying this substantive-procedural distinction to the Alabama permit requirements is manifest: Rule 1.12 contains such requirements as emission standards and compliance schedules, which are given as specific examples of substantive requirements in the above quote.

C.

Finally and perhaps most important, the actions so far of federal officials in Alabama undermine fully the general conclusion of the Sixth Circuit that "a permit has absolutely nothing to do with air quality." At the time Alabama filed this action federal officials, operating facilities emitting air pollutants, had not submitted to the Alabama Air Pollution Control Commission all the information required by Rule 1.12 and the facilities were not in compliance with Commission regulations; today, at the time of the filing of these motions, the officials have still not submitted all the information required by Rule 1.12, nor are their facilities in compliance with Commission regulations. But without the authority to enforce Rule 1.12, including the information gathering and enforcement authority therein, Alabama remains weaponless to bring these facilities into compliance, contrary both to the letter and spirit of Section 118. Therefore, the Alabama permit requirements, or in this case the lack of them, have had *everything* to do with air quality.

CONCLUSION

If this Court is to reach a broad, uniform cannon of interpretation of the application of Section 118 to state air pollution control permit requirements, it should consider as nearly as possible the full sectrum of varying permit requirements as understood and defined by the states. Considered together the Alabama and Kentucky cases, with their varying requirements, their varying approaches to these requirements, and their varying facts, could serve as exemplar threads from which to weave a broad, visible, uniform fabric of interpretive law on the application of Section 118 to state air pollution control permit requirements.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

HENRY H. CADDELL
Assistant Attorney General
of Alabama
Chief, Environmental Protection
Division

MYRON H. THOMPSON
Special Assistant Attorney General

FREDERICK S. MIDDLETON, III
Assistant Attorney General

Attorneys for Respondents
250 Administrative Building
Montgomery, Alabama 36104